SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 674

WILLIAM P. T. PRESTON, JR., and
PHYLLIS PRESTON LEE,

Petitioners,

—against—

UNITED STATES TRUST COMPANY OF NEW YORK, WILLARD S. SIMPKINS and ROLAND L. REDMOND, as Trustees under two Deeds of Trust made by WILLIAM P. T. PRESTON, SR., on February 24, 1931 and December 11, 1942, respectively, ELIZABETH PRESTON HUTCHINGS and DORIS PRESTON,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX OPPOSING CERTIORARI

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Opinion Below

The Court of Appeals' opinion is reported in the advance sheets at 394 F. 2d 456 and printed at 1a-10a.*

Counter-Statement of the Case

The petition, which concentrates upon stating the case "primarily so as to show the violation" of a procedural rule (pet. 5), obscures the prior proceedings and requires a summary of what was done in the courts below.

*Numbered references followed by "a" are to pages of petitioners' appendix; numbered references followed by "b" are to pages of respondents' appendix printed herein; "pet." references are to pages of the petition.

The complaint presented two alternative claims:

The *first* claim alleged that the written consent given in 1942 by petitioners' mother to a reduction in the principal of an intervivos trust created in 1931, was ineffective because of her remarriage.

The District Court dismissed that claim, concluding that the trust's definition of her remarriage as "death" did not destroy her capacity to consent to the reduction, and holding that a prior state court judgment (which found that she did consent, for recited consideration) was binding and barred the claim as *res judicata* (11a-18a). The Court of Appeals affirmed upon the former point, not reaching the ground of *res judicata* (1a-5a).

The *second* claim seeks reformation of a 1942 trust (composed largely of a portion of the 1931 trust's principal) to enlarge petitioners' future interests in its corpus, alleging its terms fail to express the grantor's intent that his issue should share equally *per stirpes* in his estate.

After examining the documents the District Court dismissed that claim also, but the Court of Appeals reversed and remanded it for further proceedings (6a-10a). Petitioners do not ask review of that remand, which they recognize affords them an alternate route towards their professed objective of "equality of inheritance" (pet. 4).

Petitioners claim the lower courts erred by: (1) dismissing the first claim as one upon which relief could not be granted, when the motion rested mainly on the ground of *res judicata,* and (2) drawing from the filed documents a "factual theory" which petitioners had no opportunity to rebut (pet. 2).

Even if those characterizations were justified, they display no error likely to affect other cases, and provide no "special and important reasons" for review.* Further, the characterizations do not fit what was done below. The Dis-

*Rule 19 of this Court.

trict Court's decision, like the motion, rested in substantial part on *res judicata.* In the Court of Appeals, petitioners acknowledged that the necessary papers were before the court and proceeded to argue the merits of the complaint, which turn upon points of law that admittedly "are not likely to interest this Court." (pet. 4).

Reasons for Denying the Writ

1. Contrary to petitioners' view that the District Court decided against them on grounds not before it, a substantial ground of the District Court's dismissal of the complaint was that alleged in the notice of motion, i.e., *res judicata.* In opposition, petitioners argued that their guardian *ad litem* in the state court proceedings a quarter-century ago (when they were infants) unwittingly represented conflicting interest, and that thus that judgment was defective as against them.* The District Court analyzed the situation in the state court, and concluded (17a):

> "As to [the guardian *ad litem's*] duties, there was no conflict between the children of the Grantor, and the judgment approving the Trustees' accounts is binding on this court as *res judicata.*"

The District Court further considered the competing constructions which could be placed upon the trust instrument, and concluded again (18a):

> "Here again, absent undue influence, collusion, or fraud, the conditions which Fanny imposed in order to give her consent, which were approved in the accounting proceeding, have become *res judicata.*"

The Court of Appeals recognized the District Court's reliance upon *res judicata,* although it affirmed on another ground (5a):

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*No claim of collusion, fraud or undue influence was made, petitioners conceding there was none.

> "Therefore, we do not review the District Judge's decision that the judgments of the Supreme Court of the State of New York entered in 1943 and in 1957 approving successive accounts of the trustees under the 1931 trust barred the plaintiffs' claim that the trustees' return to the grantor of some of its assets was in violation of its terms as being *res judicata.*"

In short, the District Court's decision was not *ex mero motu* (pet. 2) ("voluntarily and without prompting or request": Black's Law Dictionary) but upon substantial grounds squarely raised and argued.

2. The courts below did not imagine a "factual theory" harmful to petitioners. The motion, notifying petitioners that summary judgment was sought, put as one of its foundations the Agreement whereby their mother consented in writing to the reduction (21a). The summary factual statement filed therewith (required by a District Court rule) particularly alleged that New York State court proceedings had previously determined that petitioners' mother had "consented to the reduction" of the trust's corpus "in consideration of the creation of [two new] trusts and of other benefits to her, to [petitioners] and others and the surrender [of the] power further to terminate the 1931 trust"; and that those trusts were created and other actions taken "in consideration of the consent of plaintiff's mother to the [reduction of the] trust" (25a).

Petitioners' response (also required and filed pursuant to the District Court rule) ". . . admits that this is what the documents purported to do, but denies their legal effectiveness so to do." (1b). That petitioners' mother actually gave her consent was established on the motion (5a), and has never been denied. The Court of Appeals therefore con-

cluded that "The question presented is whether Fanny B. Morgan was legally capable of giving written consent to a reduction of the trust corpus" (3a), and that to determine that question of law, there was "no need to go beyond a construction of the 1931 trust indenture" (5a). While petitioners now assert they were deprived of an opportunity to rebut the "factual theory" adopted in the courts below (pet. 2, 13-14, 16) their brief in the Court of Appeals announced their intention to ". . . argue the validity of the first cause of action on the merits, *as the necessary papers appear to be before the Court.*" (2b; emphasis added).

3. The Court of Appeals' disposition of the case presents nothing deserving review here, and does not foreclose petitioners from their ultimate objective. As they say, their first claim was only one of the "theories" upon which they proceed, and their alternative claim for reformation will, if successful, equally attain their goal (pet. 4).

Conclusion

The case presents no occasion for review by certiorari, and the writ should be denied.

Respectfully submitted,

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November 20, 1968

EXTRACT FROM PETITIONERS' STATEMENT PURSUANT TO GENERAL RULE 9(g) OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

Responding to the moving parties' statements of alleged facts as to which there is no material issue, the opposing party contends:

* * *

2. . . . As to (a), (b) and (c), the opposing party admits that this is what the documents purported to do, but denies their legal effectiveness so to do. As to (c), the opposing party denies that the trusts were "duly created". As to (d), this is a legal conclusion and not a material fact. The opposing party denies this legal conclusion.

* * *

EXTRACT FROM BRIEF FOR PLAINTIFF-APPELLANT IN COURT OF APPEALS (p. 2)

On the other hand, the District Judge did not act on the various theories advanced by defendants, except in this limited sense: he held the issues presented by the first cause of action *res judicata* on the same analysis by which he concluded that the first cause of action was insufficient, *infra* page 30.

Despite what is submitted to be the improper procedure pursued by the District Judge in ruling that the complaint failed to state a cause of action without giving plaintiff an opportunity to be heard on that issue (*infra* page 41), this brief will argue the validity of the first cause of action on the merits, as the necessary papers appear to be before the Court.